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Supreme Court, U.S.
FILED

No. 05-83 JUL 13 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A single element missing or misdefined in jury instructions can be harmless error if, beyond a reasonable doubt, the error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1 (1999). In contrast, errors that affect the entire framework within which a trial proceeds, rather than errors in the trial process itself, are "structural" and will always invalidate a conviction. *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

It is undisputed in this assault case that the only weapon used was a firearm, but the verdict form for the enhancement failed to distinguish a "firearm" finding from a more generic "deadly weapon" finding—the "firearm" finding carries a greater sentence.

The question presented here is whether error as to the definition of a sentencing enhancement should be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement.

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STATE OF WASHINGTON,
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PETITION FOR A WRIT OF CERTIORARI

The King County Prosecuting Attorney, on behalf of the people of the State of Washington, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

OPINION BELOW

The opinion of the Washington Supreme Court is reported at *State v. Recuenco*, 154 Wash. 2d 156, 110 P.3d 188 (Apr. 14, 2005). App. A (1a-8a)[1]. The Court of Appeals decision in this case is unpublished, 117 Wash. App. 1079, 2003 WL 21738927, Wash. App. Div. 1, Jul 28, 2003, and is reproduced in the appendix to this petition. App. B (9a-19a).

[1] "App." refers to the Appendix to this Petition For A Writ Of Certiorari.

JURISDICTION

The Washington Supreme Court's judgment was entered on April 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents a question under the Fifth and Fourteenth Amendments of the Federal Constitution.

STATEMENT OF THE CASE

A. The Crime.

The material facts of the crime are not disputed. Recuenco angrily accosted his wife in an argument and threatened her with a gun. Police were summoned, the gun was recovered immediately following the incident, and it was admitted as an exhibit at trial. Recuenco conceded that the gun was his and admitted that he held it in his hand just after the assault, but he denied pointing the gun at his wife to assault her. There was no evidence of any other weapon in the assault.

B. Charges, Instructions, and Verdict.

Recuenco was charged, inter alia, with assault in the second degree. The assault charge included a special deadly weapon allegation that would support an enhanced sentence if found by a jury. The charging document specifically alleged that the assault was committed with a deadly weapon, "to wit: a handgun." Under Washington law, a "firearm" finding carries a three-year enhanced sentence. If the jury finds, on the other hand, that the offender was armed with "a deadly weapon other than a firearm," a one-year sentence enhancement is imposed. Wash. Rev. Code § 9.94A.510(3)(b), (4)(b).

After all the evidence was received, the court conferred with counsel regarding jury instructions. With regard to the weapon instruction, the Court said, "Counsel, quite frankly

there is no dispute in this case that we are talking about a gun . . ." 8RP 797. Defense counsel did not dispute that observation. Counsel later commented that, "In this case, the allegation and the basis on which this case was tried was under the theory of firearm." 8RP 902. Counsel argued for a different definition of the term "firearm" than was provided by the court but he did not dispute that the weapon at issue was a gun. 8RP 798-99. In fact, defense counsel argued that the crime of "Aiming a Firearm" should be submitted as a lesser included offense instruction. 8RP 803-09.

The jury was instructed that to convict the defendant of the crime of assault in the second degree, the State must prove beyond a reasonable doubt that "on or about September 18, 1999, the defendant intentionally assaulted Amy Recuenco with a deadly weapon . . ." (Instruction No. 8). The court also instructed the jury that "[t]he term "deadly weapon" includes any firearm." (Instruction No. 9).

Regarding the special verdict that would trigger an enhanced sentence, the court instructed as follows:

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree as alleged in Count I.
>
> A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

(Instruction No. 18). The jury was instructed to return the special verdict form only if it was unanimous. (Instruction No. 20). Recuenco proposed an identical verdict form.

Arguments of the lawyers tracked these weapon instructions. The prosecutor's closing argument focussed on the defendant's use of a gun. 9RP 822-34. Likewise, defense counsel's closing argument repeatedly referred to the gun as the weapon alleged in the assault. *See, e.g.*, 9RP 838. The

jury found the defendant guilty of assault in the second degree, and returned the special verdict form finding that he was armed with a "deadly weapon" in the commission of assault in the second degree.

During the defendant's post-trial motion to vacate the jury verdict, defense counsel stated, ". . . Your Honor, the firearm is an element of this offense as it has been pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury." 11RP 912-13. Even though there was no question that a firearm had been proved, counsel asked the cour to impose a lesser deadly weapon enhancement rather than a firearm enhancement. The trial court rejected this request, and imposed sentence for use of a firearm.

C. Appellate Review.

Recuenco challenged the weapon finding on appeal. The Washington Court of Appeals, relying on *Neder v. United States*, 527 U.S. 1 (1999), held that any error in crafting the special verdict form was harmless beyond a reasonable doubt. App. B (17a-19a).

The Washington Supreme Court granted review and considered Recuenco's case together with three consolidated cases raising numerous issues pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004). *See State v. Hughes*, 154 Wash. 2d 118, 110 P.3d 192 (2005). (20a-27a) (Excerpt of harmless error portion of *Hughes*). The court's opinion in *Hughes* contains most of the analysis of the harmless error issue challenged in this petition. The *Recuenco* decision simply cites the analysis in *Hughes*.[2] App. A (8a)

In *Recuenco*, the court reversed the sentencing enhancement, finding that pursuant to *Blakely v. Washington*, 542

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[2] Although a motion to reconsider is pending in *Hughes*, the motion does not challenge the harmless error holding, so that aspect of the opinion is final.

U.S. 296 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Recuenco's Sixth Amendment right to a jury verdict had been violated when the judge, not the jury, made the "firearm" determination.[3] App. A (5a-7a). The court applied its holding from *Hughes* that *Blakely*-type error was structural error, equivalent to the error in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), because the jury's failure to render a verdict on the "firearm" question meant that there was no "object" upon which to conduct harmless error analysis. *State v. Recuenco*, App. A (8a). *State v. Hughes*, App. C (22a-23a). The Washington Supreme Court thus concluded that harmless error review was impossible. It expressly distinguished *Neder*, holding that *Neder* did not apply to errors pursuant to *Blakely* or *Apprendi*. App. C (26a-27a).

Accordingly, the court in *Recuenco* reversed the "firearm" sentence and remanded for the ministerial act of imposing a shorter sentence using the generic "deadly weapon" enhancement. App. A (8a).

There was no state constitutional basis for this decision. In fact, prior to *Blakely* and *Apprendi*, the Washington Supreme Court repeatedly found harmless error where deadly weapon enhancements were misdefined, even where the burden of proof was misstated. *See, e.g., State v. Fowler*, 114 Wash. 2d 59, 785 P.2d 808 (1990). The *Recuenco* court's decision rested wholly on its belief that *Sullivan v. Louisiana* precluded harmless error analysis for Sixth Amendment sentencing error.

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[3] The State argued that any error was invited by the defendant's proposed instructions but the Court rejected the invited error argument. That ruling rests on Washington law, presents no federal question, and thus is not challenged in this petition. Similarly, this petition does not present the myriad, and transitory, "plain error" questions now pending in the federal courts of appeal under Fed. R. Crim.P.52(b). *See United States v. Rodriguez*, 406 F.3d 1261 (11th Cir. 2005), *cert. denied*, ___ U.S. ___, 2005 WL 483174, 73 USLW 3531 (U.S. June 20, 2005) (No. 04-1148).

REASONS FOR GRANTING THE PETITION

This case is an excellent vehicle for resolving an important federal constitutional question under the Fifth and Fourteenth Amendments regarding the scope of harmless error analysis, *Chapman v. California*, 386 U.S. 18, 20-21 (1967), and upon which there is a conflict and substantial controversy. Supreme Court Rule 10(b), (c). The general criteria for granting certiorari of a state court case are met. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice*, 271-72 (8th ed. 2002).

First, the ability of an appellate court to find harmless error is analyzed in Washington under the Federal Constitution, *State v. Brown*, 147 Wash. 2d 330, 340-41, 58 P.3d 889 (2002), and is a substantial question under the Federal Constitution. Recent Washington Supreme Court decisions, as well as the recent decision from the North Carolina Supreme Court in *State v. Allen*, (2005 WL 1539186 at *11-17), ___ S.E.2d ___ (N.C. 2005), make it clear that these state courts believe *Sullivan v. Louisiana* precludes harmless error analysis on *Apprendi* and *Blakely* error.

Second, the Washington Supreme Court's decision conflicts with this Court's decisions, with federal appellate courts' decisions, and with decisions of other state supreme courts. Review by writ of certiorari to a state supreme court is appropriate under such circumstances to determine whether the Washington Supreme Court "has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice*, at 273(j) (citing cases including *Bullington v. Missouri*, 451 U.S. 430, 431 (1981) (certiorari granted on issue whether reasoning of prior Court precedent also applies to different kind of sentencing hearing) and *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read Miranda too broadly")).

Third, there is disagreement in the federal and state courts over whether *Blakely* error is structural error that is subject to harmless error analysis, even outside the "plain error" context.

Finally, the mode of analysis used by the Washington Supreme Court will have continuing, not simply transitory, impact on harmless error analysis in any state with a mandatory sentencing guidelines structure under which aggravating factors are submitted to a jury. Under such a system, mistakes in instructing the jury on sentencing enhancements will occur, and courts need to know whether harmless error analysis is possible for such mistakes. In this way, the issue here is much different from the largely transitory post-*Booker*[4] "plain error" litigation that is currently sweeping the federal courts.

For these reasons, review by this Court is appropriate.

A. Conflict with This Court's Precedent.

The *Recuenco* decision conflicts with several decisions of this Court on an important question of federal constitutional law, resulting in an improper application of this Court's precedent.

Neder was a tax fraud prosecution wherein the jury was told that it did not need to find that a misstatement in a tax return was "material." Thus, the jury's verdict did not address this issue. Neder claimed that failure of the jury to render a verdict on this element violated his right to a jury trial, and was not subject to harmless error analysis.

This Court rejected Neder's arguments, reaffirming that "most constitutional errors can be harmless." *Neder*, 527 U.S. at 8 (citing *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). The Court held that misdefining or omitting an ele-

[4] *United States v. Booker*, ___ U.S., ___, 125 S.Ct. 738 (2000).

ment of the crime could be harmless, and rejected comparisons to *Sullivan v. Louisiana*. In particular, the Court narrowly interpreted *Sullivan*, limiting its holding to situations wherein the jury's verdict was completely vitiated by error. *Neder*, 527 U.S. at 11. The Court rejected the argument that a missing or misdefined element created a "gap" that could never be filled by harmless error analysis. *Id.* at 13-14. ". . . [T]he absence of a 'complete verdict' on every element of the offense establishes no more than that an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee." *Id.* at 12. But that conclusion does not establish that harmless error is impossible.

This Court ultimately concluded that the facts in *Neder* clearly illustrated that a harmless mistake had occurred in trial of the case. Underreporting $5 million in income was obviously material, materiality was never in dispute at trial, so any error was harmless. *Neder*, at 15.

More recently, in *Mitchell v. Esparza*, 540 U.S. 12 (2003), harmless error analysis applied even in a capital case. Esparza was charged with capital murder committed during the course of a robbery. The charging document and jury instructions failed to allege that Esparza was the "principal offender"—a requirement for imposing the death penalty under Ohio law. Esparza argued on appeal that this error precluded imposition of the death penalty but Ohio courts found the error harmless. The Eighth Circuit Court of Appeals reversed, reasoning that "failure to charge in the indictment that respondent was a principal was the functional equivalent of 'dispensing with the reasonable doubt requirement'". . . (citing *Sullivan v. Louisiana*). *Esparza*, 540 U.S. at 16.

This Court reversed the Eighth Circuit in a per curiam opinion:

> . . . In noncapital cases, we have often held that the trial court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-

> error analysis. *E.g.*, *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *California v. Roy*, 519 U.S. 2, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996) *(per curiam)*; *Carella v. California*, 491 U.S. 263, 266, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) *(per curiam)*; *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987). In *Neder*, for example, we held that such an error "differs markedly from the constitutional violations we have found to defy harmless-error review." 527 U.S., at 8, 119 S.Ct. 1827. In so holding, we explicitly distinguished *Sullivan* because the error in *Sullivan*—the failure to instruct the jury that the State must prove the elements of an offense beyond a reasonable doubt—"'vitiat[ed] *all* the jury's findings,'" 527 U.S., at 11, 119 S.Ct. 1827, whereas the trial court's failure to instruct the jury on one element of an offense did not, *see id.*, at 13-15, 119 S.Ct. 1827. Where the jury was precluded from determining only one element of an offense, we held that harmless-error review is feasible. *Ibid.*

Esparza, 540 U.S., at 16-17 (italics in original). This Court further held that, because Esparza was the sole participant alleged to have committed the robbery and murder, the Ohio court's harmless error determination was not unreasonable. *Esparza*, 540 U.S. at 18.

Thus, this Court's precedents clearly provide that harmless error analysis is appropriate even if the trial court completely omitted an element of the crime from a jury instruction or charging document. It is also clear that the broader language in *Sullivan v. Louisiana*, suggesting that any gap in the jury instructions could not be filled by a harmless error analysis, has been limited by *Neder*.

It follows that the error in the present case, failure to use a sufficiently precise special verdict form on the nature of a sentencing factor, should be subject to harmless error analysis. The weapon enhancement is a sentencing factor, not an

element of the crime. Although sentencing factors are the "functional equivalent" of elements for Sixth Amendment purposes,[5] they surely are not of *greater* significance than an element of the crime. Misdefining a sentencing enhancement no more vitiates the entire jury verdict than does omitting an element of the crime. Thus, it would be incongruous to permit harmless error analysis as to a missing element, but to prohibit such analysis as to a misdefined sentencing factor.

Recuenco (and *Hughes*) are simply inconsistent with *Neder*. It thus appears that the Washington Supreme Court has not "properly interpreted, applied, or extended a prior Supreme Court decision in a given situation." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice*, at 273(j). Review should be granted to correct this conflict between this Court's precedents and the erroneous interpretation of the federal constitution by the Washington Supreme Court. Supreme Court Rule 10(c).

B. Conflict with the Circuit Courts of Appeal.

The Washington Supreme Court's analysis relies on a decision of the U.S. Court of Appeals for the Ninth Circuit—a decision that conflicts with decisions of all the other federal courts of appeal, illustrating the need for review by this Court.

The Washington Supreme Court relied upon *United States v. Jordan*, 291 F.3d 1091 (9th Cir. 2002), in holding that a Sixth Amendment sentencing error can never be harmless. *See State v. Hughes*, App. C (24a-25a). In *Jordan*, drug quantity was not proved to a jury beyond a reasonable doubt, yet Jordan's sentence was increased based on the quantity of drugs possessed. Accordingly, the Ninth Circuit found a Sixth Amendment violation. Because the error was preserved at sentencing, it was to be reviewed for "harmless error" rather than "plain error." *Jordan*, at 1095. Regarding harmless

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[5] *Apprendi*, 530 U.S. at 494 n. 19.

error analysis, the Ninth Circuit expressed uncertainty over how to proceed:

> As there is little judicial experience on this issue, *it is not perfectly clear how to analyze whether* Apprendi *error is harmless*. . . . We see two analytical options: One is that we might look only at the sentence received to see if it is greater than the maximum sentence the defendant should have faced. The other is that, instead, we might canvass the record to see whether, had the defendant been properly indicted and the jury properly instructed, we could say beyond any reasonable doubt that the defendant would have been found guilty of the more severely punishable crime.

Id. (citations omitted; italics added). The court then held that it would be impossible to determine whether error was harmless where the aggravating factor was neither pled nor proved to a jury. *Id.* at 1096-97. Although the court did not expressly find the error to be "structural," it appears to have adopted a de facto structural error analysis for Sixth Amendment errors, similar to that employed by this Court in *Sullivan v. Louisiana*. If this is the intended holding of the Ninth Circuit, that circuit stands alone.

Yet, more recent authority from the Ninth Circuit casts doubt upon whether that court intends harmless error analysis to apply to post-*Apprendi* questions. In *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005), the court, sitting en banc, decided to permit limited remands in "plain error" cases. The court noted, however, that "[a] different analysis will apply when a defendant preserves his Sixth Amendment claim by challenging the sentencing guidelines on constitutional grounds before the district court." *Ameline*, at 1078 n.1 (citing cases that permit harmless error analysis). Thus, the Ninth Circuit is inconsistent on whether it will permit harmless error analysis for such errors.

In any event, it is clear that every other circuit rejects the notion that Sixth Amendment sentencing errors are structural errors. The First Circuit, for example, recently rejected a claim that *Apprendi* error is structural error. *United States v. Antonakopoulos*, 399 F.3d 68, 80 n. 11 (1st Cir. 2005) ("plain error" case). *See also United States v. Mojica-Baez*, 229 F.3d 292, 309-10 (1st Cir. 2000) (holding that a failure to allege the precise nature of a weapon was not structural error; error did not so "interfere with such basic and fundamental constitutional protections that they go to the structure of our criminal law system").

The Second Circuit has held that *Blakely* error is subject to harmless error analysis. *United States v. Mincey*, 380 F.3d 102, 105 (2nd Cir. 2004) (per curiam), *vacated and cert. granted by Ferrell v. United States*, 125 S.Ct. 1071 (2005); *United States v. Friedman*, 300 F.3d 111, 127-28 (2nd Cir. 2002), *cert. denied*, 538 U.S. 981, 155 L. Ed. 2d 672 (2003) (*Apprendi* error).

The Third Circuit rejected the "structural error" argument in the context of a plain error analysis, holding that not all *Apprendi* error is per se prejudicial. *United States v. Vazquez*, 271 F.3d 93, 102-03 (3rd Cir. 2001).

Likewise, the Fifth Circuit has held in *United States v. Matthews*, 312 F.3d 652 (5th Cir. 2002), that *Apprendi* error is subject to harmless error analysis. Matthews received a court-imposed aggravated sentence based on a "street gang" finding. The Fifth Circuit found error in the judge, not the jury, making the finding, but the court concluded that such error was simply instructional error, and thus subject to harmless error analysis. *Matthews*, at 665. The court expressly rejected the notion that such error could never be harmless. *Id.* It found that evidence of gang involvement was "extensive, overwhelming, and essentially uncontradicted" in that case. *Id.*

The Sixth Circuit has also held that *Apprendi* error is not structural error, and thus is subject to harmless error analysis. *See United States v. Campbell*, 364 F.3d 727, 737 (6th Cir. 2004) (drug quantity), and *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2003) (same).

The Seventh Circuit has observed that "judicial resolution of a factual dispute that should have been presented to a jury is not a 'structural error' that requires automatic reversal" because "juries are not necessarily more accurate than judges at finding facts." *Knox v. United States*, 400 F.3d 519, 523 (7th Cir. 2005) (citing *Schriro v. Summerlin*, 542 U.S. 348 (2004)).

The Eighth Circuit has held in a number of contexts that *Apprendi* error is not structural. *United States v. Allen*, 406 F.3d 940 (8th Cir. 2005) (en banc) (failure to charge one statutory aggravating factor in capital case is not structural error); *United States v. McDonald*, 336 F.3d 734, 738 (8th Cir. 2003) (drug quantity not proved to jury is subject to harmless error analysis) (citing *United States v. Anderson*, 236 F.3d 427 (8th Cir. 2001)).

The Tenth Circuit also applies harmless error analysis to preserved *Blakely* claims. *See United States v. Riccardi*, 405 F.3d 852 (10th Cir. 2005).

The Eleventh Circuit is in accord with these other circuits. In *United States v. Rodriguez*, 406 F.3d 1261 (11th Cir. 2005), *cert. denied*, __ S. Ct. ___, 2005 WL 483174, 73 USLW 3531 (U.S. Jun 20, 2005) (No. 04-1148), the district court judge had ruled, using reasoning similar to that of the Washington Supreme Court, that *Booker* error was a "structural" defect that precluded analysis of the facts of each case. The Court of Appeals rejected this approach, correctly noting that "none of the eleven other circuits to address *Booker* plain error issues have taken such an extreme approach." *United States v. Rodriguez*, 406 F.3d at 1263-64. The court held that

Booker error was not akin to the structural error noted in *Sullivan v. Louisiana. Id.*

The D.C. Circuit, too, agrees that post-*Apprendi* error is not structural. *United States v. Lafayette*, 337 F.3d 1043, 1052 (D.C. Cir. 2003).

Thus, *Recuenco* conflicts with nearly every federal circuit court of appeal Review is appropriate under Supreme Court Rule 10(b).

C. Conflict with State Appellate Courts.

At least eight state courts of last resort have applied harmless error analysis to Sixth Amendment sentencing error but there appears to be confusion in some intermediate appellate courts as to whether *Neder* is properly applied to such errors post-*Apprendi*. And now both the Washington and the North Carolina Supreme Courts have held that harmless error is impossible in post-*Apprendi* and post-*Blakely* cases.

Many state supreme courts have applied harmless error analysis. *See e.g. State v. Henderson*, 209 Ariz. 300, 100 P.3d 911 (2004) (holding that *Blakely* error in judicial findings of aggravating facts is not structural error and that "every federal circuit court has . . . been uniform in holding that *Apprendi* error can be reviewed for harmless error"); *People v. Sengpadychith*, 26 Cal. 4th 316, 109 Cal. Rptr. 2d 851, 27 P.3d 739 (2001) (gang enhancement found by judge is subject to harmless error analysis); *State v. Davis*, 255 Conn. 782, 793-94, 772 A.2d 559, 567-68 (2001) (firearm finding by judge rather than jury was harmless error); *People v. Thurow*, 203 Ill. 2d 352, 362-71, 786 N.E.2d 1019, 1025-29 (2003) (judicial finding of "household member" aggravator was harmless error—but doubts about *Neder* are discussed); *State v. Burdick*, 782 A.2d 319, 327-28 (Me. 2001) (sentencing factor depending on attempted murder victim's identity as a police officer decided by judge, not jury; court rejects "struc-

tural error" arguments in context of state court's plain error analysis); *Clark v. State*, 621 N.W.2d 576, 581 (N.D. 2001) (judicial decision on firearm aggravator was harmless error where defendant conceded possession of the firearm); *Teague v. Palmateer*, 184 Or. App. 577, 590, 57 P.3d 176, 186 (2002) (recognizing that most courts have found *Blakely* error subject to harmless error analysis and thus concluding that it is not a watershed change in the law); *State v. Gordon*, 262 Wis. 2d 380, 663 N.W. 2d 765 (2003).

In addition to the Washington Supreme Court, however, the North Carolina Supreme Court recently decided that harmless error analysis is never appropriate as to Sixth Amendment sentencing error. *See State v. Allen*, (2005 WL 1539186 at *11-17.), ___ S.E.2d ___ (N.C. 2005). The *Allen* court essentially adopted the analysis of the *Hughes* court, and held that harmless error could never be applied where the jury failed to consider a sentencing factor. *Id.* at *16.

The dissenting North Carolina justices argued at length that the majority decision jeopardized an important federal constitutional doctrine that serves as an anchor in modern appellate and criminal law jurisprudence. *Id.* at *18-20 (Martin, J., concurring in part and dissenting in part). The dissent also cogently explained the theoretical basis for harmless error analysis in this context, and illustrated the irreconcilable conflict between the majority's decision and this Court's precedents. *Id.* at *23-28. Finally, the dissenting opinion lists much of the caselaw touching on this subject in the federal and state courts. *Id.* at *28 n. 13, n. 15. Still, in the face of all these arguments, the majority held that harmless error was impossible.

Several state appellate courts also continue to express doubts about *Neder*'s vitality, or at least its application to *Blakely* error. For example, the majority opinion from the Illinois Supreme Court in *Thomas* found harmless error but

questioned whether *Neder* would be overruled. *Thurow*, 786 N.E.2d at 1025-29. *See also Thurow*, 786 N.E.2d at 1032-33 (Kilbride, J., dissenting—arguing that Sixth Amendment sentencing error can never be harmless), *Cf. Thurow*, at 1030-31 (Freeman, J., specially concurring in the opinion—finding that *Apprendi* and *Neder* can be harmonized). *See also State v. Nitz*, 353 Ill. App. 3d 978, 994-99, 820 N.E. 2d 536, 553-55 (2004) (questioning the continued vitality of *Neder*).

In another decision, an intermediate Indiana appellate court questioned the validity of *Neder* and cited to the Washington Supreme Court's *Hughes* decision as authority for the claim that *Blakely* error can never be harmless. *See Freeze v. State*, 827 N.E. 600, 604-05 (Ind. Ct. App. 2005) (discussing *Blakely* error under *Neder* and *Sullivan*).

Although the Arizona Supreme Court has applied harmless error in the *Blakely* context, *Henderson, supra*, Arizona appellate court judges have questioned whether *Blakely* error is structural. *See State v. Estrada*, 108 P.3d 261, 279 (Ariz. Ct. App. 2005) (Kessler, dissenting); and *State v. Resendis-Felix*, 100 P.3d 457, 461 (Ariz. Ct. App. 2004) (Eckerstrom, concurring).

Likewise, two judges on a three-judge panel of the Washington Court of Appeals held, before *Hughes* was decided, that *Blakely* error was structural. *See State v. Fero*, 125 Wash. App. 84, 104 P.3d 49 (2005).

Finally, it should be noted that the *Recuenco* decision is now the *third* Washington Supreme Court opinion holding that *Apprendi*-style error is structural error. *See State v. Thomas*, 150 Wash.2d 821, 849-50, 83 P.3d 970 (2004). Given these conflicting approaches in the state appellate courts, and given that there is a clear split of authority from two separate state courts of last resort, review by this Court is appropriate. Supreme Court Rule 10(b).

D. The Washington Supreme Court's Erroneous Interpretation of the Federal Constitution Creates a Continuing Analytical Difficulty, Not Just the Transitory Disruption Occurring in the Federal Courts on Similar Sixth Amendment Sentencing Claims.

Unlike many post-*Blakely* plain error or harmless error cases, the issues presented by the *Hughes* and *Recuenco* decisions will not abate over a short period of time. This decision precludes harmless error analysis on *any* type of instructional sentencing enhancement error, even where a jury passed on some aspect of the enhancement.

In the federal courts and in many states, post-*Blakely* or post-*Booker* cases will be processed through the appellate courts over the course of the next year or so. But states like Washington, which have authorized jury trials for aggravating factors, will continue to submit innumerable sentencing questions to juries through special verdict forms and interrogatories. Wash. Rev. Code § 9.94A.535. For instance, juries will be asked to decide whether a crime was committed with "deliberate cruelty" or against a "particularly vulnerable victim." Wash. Rev. Code § 9.94A.535(3)(a), (b). Under the *Recuenco* and *Allen* decisions, states like Washington and North Carolina will be precluded by the Federal Constitution from conducting harmless error analysis if any mistake is made in instructing the jury on these sentencing enhancements.

This continuing problem will perpetuate the anomalous results in *Recuenco* and *Allen*, whereby harmless error is possible where an *element* is wholly omitted, but impossible if a *sentencing factor* is omitted, or even just misdefined.

CONCLUSION

This Court should grant certiorari to decide this important federal question. The Washington State Supreme Court's decision is based on federal constitutional law, conflicts with this Court's decision in *Neder*, conflicts with numerous decisions of the United States Courts of Appeal, and conflicts with decisions from courts of last resort in the states. Moreover, as evidenced by the Ninth Circuit's decision in *Jordan*, and by various state appellate court decisions, a split exists over whether *Neder* harmless error analysis is appropriate post-*Apprendi* and post-*Blakely*. This issue will be a continuing problem in any jurisdiction that has maintained a mandatory guidelines system where sentencing enhancements will be decided by juries.

This case is an excellent vehicle for resolving this important federal constitutional question, as the issue was preserved below, the material facts are not in dispute, the error alleged is conceded, and the harmlessness of that error is palpable.

Review is appropriate pursuant to Supreme Court Rule 10.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF WASHINGTON,
En Banc

No. 74964-7

STATE OF WASHINGTON,
Respondent,

v.

ARTURO R. RECUENCO,
Petitioner.

Argued Nov. 9, 2004
Decided April 14, 2005

Background: Defendant was convicted by jury in the Superior Court, King County, Linda Lau, J., of second degree assault, interfering with domestic violence reporting, and third degree malicious mischief. The jury also returned a true finding on a deadly weapon enhancement allegation, and the trial court imposed a sentence enhancement based on defendant's being armed with a firearm. The Court of Appeals affirmed. Review was granted.

Holdings: The Supreme Court, Fairhurst, J. held that:

(1) imposition of firearm enhancement, absent jury finding, violated defendant's Sixth Amendment jury trial right as defined by *Blakely v. Washington*, abrogating *State v. Meggyesy*, 90 Wash.App. 693, 958 P.2d 319, *State v. Rai*, 97 Wash.App. 307, 983 P.2d 712, and *State v. Olney*, 97 Wash.App. 913, 987 P.2d 662; (2) error was not invited; and (3) *Blakely* error can never be deemed harmless.

Reversed and remanded.

Proper remedy for trial court's error in imposing sentence enhancement based on defendant's being armed with a firearm, absent jury finding supporting such enhancement, which error violated defendant's Sixth Amendment jury trial right as defined by *Blakely v. Washington*, was remand for resentencing based solely on deadly weapon enhancement, which was supported by jury's special verdict, as Supreme Court would not imply a procedure by which jury could find sentencing enhancements on remand. U.S.C.A. Const. Amend. 6; West's RCWA 9.94A.533, 9.94A.602. Gregory Charles Link, Washington Appellate Project, Rita Joan Griffith, Seattle, for Petitioner. James Morrissey Whisman, King County Prosecutor's Office, Seattle, for Respondent. James Elliot Lobsenz, Carney Badley Spellman, Seattle, for Amicus Curiae Wash. Ass'n of Criminal Defense Lawyers.

FAIRHURST, J.

Arturo Recuenco was charged with second degree assault with a deadly weapon enhancement because he assaulted his wife while holding a gun. At trial, the jury returned a guilty verdict on the assault charge and a special verdict that Recuenco was armed with a deadly weapon. But the trial court imposed a sentence enhancement based on Recuenco's being armed with a firearm, which was greater than that for a deadly weapon. This court granted review to consider whether imposition of a firearm enhancement without a jury finding that Recuenco was armed with a firearm beyond a reasonable doubt violated Recuenco's Sixth Amendment right to a jury trial as defined by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its progeny. As per our reasoning in *State v. Hughes*, No. 74147-6, — Wash.2d —, 110 P.3d 192, 2005 WL 851137 (Wash. April 14, 2005), we hold that the trial court's imposition of the firearm enhancement violated Recuenco's Sixth Amendment right to a jury trial. We reverse the Court of Appeals, vacate Recuenco's sentence, and remand for resentencing based on the

one-year deadly weapon enhancement supported by the jury's special verdict.

I. FACTUAL AND PROCEDURAL HISTORY

Based on allegations that Recuenco became upset with his wife for not cooking for his relatives, smashed their stove, and threatened her with a gun, the King County prosecutor charged Recuenco with second degree assault, interfering with domestic violence reporting, and third degree malicious mischief. The information further charged Recuenco with "being armed with a deadly weapon, to-wit: a handgun, under the authority of RCW 9.94A.125 and 9.94A.310."[1] Clerk's Papers (CP) at 159.

The trial court submitted the following special verdict form to the jury: "Was the defendant ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?" CP at 237. Defense counsel did not object to that special verdict form; in fact, he proposed an identical one. And the prosecutor never requested use of a special verdict form regarding the presence of a firearm. To the contrary, when defense counsel argued that the definition of firearm should have been submitted to the jury to explain the deadly weapon definition, the prosecutor explicitly stated, "[t]he method under which the state is alleging and the jury found the assaults committed was by use of a deadly weapon." 11 Verbatim Report of Proceedings (RP) at 909. The prosecutor further stated, "in the crime charged and the enhancement the state alleged, there is no elements [sic] of a firearm. The element is assault with a deadly weapon." 11 RP at 910.

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[1] These provisions have been recodified as RCW 9.94A.602 and RCW 9.94A.533 respectively. For simplicity, the current versions are used in this analysis.

The jury convicted Recuenco of second degree assault, interfering with domestic violence reporting, and third degree malicious mischief. The jury also returned a special verdict that Recuenco had been armed with a deadly weapon. The jury was not asked to, and therefore did not, return a special verdict that Recuenco committed the assault while armed with a firearm.

The standard range sentence for count I, the assault, was three to nine months. The deadly weapon enhancement would have added one mandatory year, while a firearm enhancement would have added three mandatory years. RCW 9.94A. 533(3)(b), (4)(b).

At the sentencing hearing, the prosecutor requested the low end of the standard range sentence for count I: 3 months, with a 36-month enhancement for use of a firearm. The prosecutor further requested that the court suspend time on the other two counts. Defense counsel agreed with a base sentence at the low end of the standard range for count I, but refuted the proposed 36-month enhancement, arguing that the prosecutor would have had to allege and prove that Recuenco was armed with a firearm, and that the jury would have had to return a firearm special verdict. The court imposed a 39-month sentence for the assault conviction, including 36 months for being armed with a firearm, reasoning that it had "no discretion but to impose the statutorily mandated term with regard to the deadly weapon enhancement." 11 RP at 928. The court further imposed 1 year and 90 days for counts II and III but suspended those sentences.

Recuenco appealed his conviction and sentence arguing, among other things, that he was deprived of due process because a firearm enhancement was imposed without notice, proof beyond a reasonable doubt, and a jury finding. In an unpublished opinion, the Court of Appeals found against Recuenco on each issue and held that even if the failure of the jury's finding a firearm deprived Recuenco of his right to a

jury trial as defined by *Apprendi* (which it assumed without deciding), any error was harmless. *See State v. Recuenco*, noted at 117 Wash.App. 1079, 2003 WL 21738927, at *5.

Recuenco petitioned this court for discretionary review. The United States Supreme Court subsequently decided *Blakely v. Washington*,— U.S.—, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which Recuenco submitted as additional authority. We granted review as to the *Apprendi/Blakely* issues only. *State v. Recuenco*, 152 Wash.2d 1001, 101 P.3d 865 (2004).

II. ISSUES

1. Did the trial court's firearm sentence enhancement violate Recuenco's Sixth Amendment right as defined by *Apprendi* and *Blakely* when the jury only explicitly found facts supporting a deadly weapon enhancement?

2. If so, was the error invited?

3. If there was error and it was uninvited, can it be deemed harmless?

III. ANALYSIS

In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348. This court subsequently interpreted that decision to hold that statutory maximum meant the absolute maximum sentence provided by the legislature for an offense, not the maximum sentence allowed by the jury's findings. *State v. Gore*, 143 Wash.2d 288, 313-15, 21 P.3d 262 (2001) (citing *Apprendi*, 530 U.S. at 481, 120 S.Ct. 2348; *McMillan v. Pennsylvania*, 477 U.S. 79, 92, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)). The United States Supreme Court corrected our interpretation recently in *Blakely* by holding that the statutory maximum referenced in

Apprendi "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 124 S.Ct. at 2537 (citing *Ring v. Arizona*, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). We considered *Blakely's* implications on our sentencing enhancement provisions for the first time in *State v. Hughes*. In *Hughes* we concluded that (1) *Blakely* did not invalidate our exceptional sentence provisions, (2) *Blakely* violations may never be deemed harmless, and (3) in the absence of legislative direction, cases reversed for *Blakely* violations will be remanded for resentencing based on only the original jury verdict. We apply that reasoning here and consider additionally whether Recuenco invited the asserted *Blakely* violation.

A. Did Imposition of the Firearm Enhancement Violate Recuenco's Sixth Amendment Jury Trial Right as Defined by *Blakely*?

[3] ¶ 10 The jury did not explicitly find beyond a reasonable doubt that Recuenco committed assault with a firearm; it found only the use of a deadly weapon. Without an explicit firearm finding by the jury, the court's imposition of a firearm sentence enhancement violated Recuenco's jury trial right as defined by *Apprendi* and *Blakely*—Recuenco's sentence was greater than that allowed solely based on the facts found by the jury.[2] The State concedes the existence of a *Blakely* Sixth Amendment violation, stating that its previous argument that the judge's imposition of the firearm enhancement was not subject to *Apprendi* was "no longer tenable" following *Blakely* and that Recuenco was "entitled" to a jury

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[2] Cases that allowed judges to impose firearm enhancements where juries found only the presence of deadly weapons are no longer good law in light of *Blakely*. *See, e.g., State v. Meggyesy*, 90 Wash.App. 693, 958 P.2d 319, *review denied*, 136 Wash.2d 1028, 972 P.2d 465 (1998); *State v. Rai*, 97 Wash.App. 307, 983 P.2d 712 (1999); *State v. Olney*, 97 Wash.App. 913, 987 P.2d 662 (1999).

finding that "he was armed with a firearm." Resp't's Supp. Br. at 7-8, 10-11. But the State argues the violation does not require vacation of his sentence because (1) Recuenco invited the error by proposing the special verdict form he now challenges and (2) the error was harmless.

B. Did Recuenco Invite the *Blakely* Error?

The Court of Appeals opinion stated in a footnote that it "appeared" that Recuenco had invited the error at issue because he had proposed the special verdict form the court used asking the jury only to find the existence of a deadly weapon, not specifically a firearm. *Recuenco*, 117 Wash.App. 1079, 2003 WL 21738927, at *5 n. 33 (citing *City of Seattle v. Patu*, 147 Wash.2d 717, 720, 58 P.3d 273 (2002) and stating that if "defendants propose erroneous instructions that do not include all elements of a crime, but do not attempt to add a remedial instruction, they invite the error and cannot complain on appeal."). The State adopts the Court of Appeals' reasoning in its argument asserting that Recuenco cannot now challenge the special verdict form because he proposed it.

The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally. *See Patu*, 147 Wash.2d at 720, 58 P.3d 273. The doctrine has been applied to errors of constitutional magnitude, including where an offense element was omitted from the "to convict instruction." *Id.* (citing *State v. Studd*, 137 Wash.2d 533, 547, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wash.2d 867, 869, 792 P.2d 514 (1990)).

Both the Court of Appeals and the State misinterpret the alleged error here. Recuenco did not and does not assert that the *special verdict form* asking the jury to find the presence of a deadly weapon was error. Indeed, he proposed that instruction because he believed and continues to believe that it was the correct instruction for the charge of second degree assault

with a deadly weapon enhancement. Instead, Recuenco claims that the *judge's imposition of the firearm enhancement without the jury's finding the existence of a firearm* was an error violating his due process and jury trial rights. Moreover, he objected to that error at trial. The error asserted was not invited.

C. Can the Error be Deemed Harmless?

In *Hughes*, this court considered the applicability of harmless error analysis to *Blakely* Sixth Amendment violations and held that such violations can never be deemed harmless because to do so would be to speculate on the absence of jury findings. *See Hughes*, No. 74147-6, at 205- 208. Given this decision, we reverse the Court of Appeals and hold that the violation was not harmless.

IV. CONCLUSION

The imposition of a firearm enhancement that was not supported by the jury's special verdict violated Recuenco's Sixth Amendment jury trial right as defined by *Apprendi* and *Blakely*. That error was neither invited nor harmless.[3] We reverse the Court of Appeals and vacate Recuenco's sentence. Because we held in *Hughes* that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury's special verdict. *See Hughes*, No. 74147-6, at 208-209.

WE CONCUR: ALEXANDER, C.J., C. JOHNSON, MADSEN, SANDERS, BRIDGE, CHAMBERS, OWENS, JJ., and IRELAND, J.P.T.

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[3] Given our decision, we do not address additional arguments Recuenco makes in support of vacation of his sentence.

APPENDIX B

COURT OF APPEALS OF WASHINGTON,
Division 1

No. 46208-3-I

STATE OF WASHINGTON,
Respondent,

v.

ARTURO R. RECUENCO,
Appellant.

July 28, 2003

Appeal from Superior Court of King County.

Washington Appellate Project, Attorney at Law, Gregory Charles Link, WA Appellate Project, Seattle, WA, for Appellant.

Prosecuting Atty King County, James Morrissey Whisman, King County Prosecutor/appellate Unit, David M. Seaver, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

GROSSE, J.

A jury instruction that relieves the State of its burden to prove each element of the crime charged constitutes a 'manifest' constitutional error and may be reviewed for the first time on appeal. Special verdict forms contained in jury instructions are also subject to constitutional constraints and must not exclude elements of the crime charged. However, even if we assume that the special verdict form here did not

include all the elements of the crime, it is clear that any error was harmless beyond a reasonable doubt. Affirmed.

FACTS

On September 18, 1999, police officers Lucas and Moore responded to a 911 call from the home of Arturo Recuenco. When Recuenco answered the door, the officers heard a woman within shout that Recuenco had a gun and was going to kill her. The woman, Recuenco's wife, approached the door crying and upset. Recuenco was charged with (1) second degree assault[1] with an allegation that he was armed with a handgun, a deadly weapon;[2] (2) interfering with a domestic violence report;[3] and (3) third degree malicious mischief.[4]

At trial, Recuenco's wife testified that on the day in question Recuenco had yelled at her for not preparing dinner for his sisters, smashed the glass stove top with a metal pipe, and then retrieved a gun from a filing cabinet and pointed it at her. She stated that she was very afraid when her husband pointed the gun at her as she thought he was going to shoot her. She testified that when she attempted to call 911, Recuenco ran to the phone cord and yanked it, ripping the jack from the wall. Officer Lucas testified that Recuenco's wife showed him where the gun was located. It was loaded and the officer took it into evidence.

Recuenco denied pointing the gun at his wife or threatening her. He stated that when his wife began to dial 911 he attempted to take the phone from her but unintentionally grabbed the cord and pulled the phone jack from the wall. Recuenco admitted that he damaged the stove because he was angry that his wife would not cook dinner. At the time of the

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[1] RCW 9A.36.021.

[2] Former RCW 9.94A.125 (1999), recodified as RCW 9.94A.602.

[3] RCW 9A.36.150.

[4] RCW 9A.48.090.

incident, the parties had been married for 15 years and had recently purchased the stove. Recuenco requested that the court instruct the jury on aiming a firearm and fourth degree assault as a lesser included or lesser degree offense of second degree assault. The court refused. The jury found Recuenco guilty of all charges. The jury also found by special verdict that he was armed with a deadly weapon when he committed the assault, but did not specifically find that he was armed with a firearm. The court imposed a three-year firearm enhancement on Recuenco's sentence for second degree assault.[5]

Recuenco appeals, claiming that the State failed to prove the malicious mischief charge and that the trial court erred in refusing the proposed jury instructions. Recuenco also argues that he was improperly found guilty of a general rather than the more specific offense of aiming a firearm, and the sentencing court violated his due process rights by imposing a firearm sentence enhancement where the jury entered a special verdict that he was armed with a deadly weapon, but not that he was armed with a firearm.

DISCUSSION

1. Malicious Mischief Charge.

Recuenco was charged with malicious mischief under RCW 9A.48.090. The State was required to prove beyond a reasonable doubt that Recuenco knowingly and maliciously caused physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree.[6]

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[5] Former RCW 9.94A.310(3) (1998), recodified as RCW 9.94A.510(3).

[6] In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); RCW 9A.48.090. Malicious mischief in the first degree requires damage exceeding $1,500.00 and malicious mischief in the second degree requires damage exceeding $250.00. RCW 9A.48.070; RCW 9A.48.080.

Recuenco argues that the State failed to prove each element of malicious mischief beyond a reasonable doubt because he was convicted based on damage to co-possessed community property. Recuenco argues that community property does not constitute 'property of another' as required by the malicious mischief statute.[7] However, the Supreme Court recently held otherwise.

In *State v. Coria*, a defendant who had argued with his wife and damaged items in their home was charged with malicious mischief.[8] The Supreme Court specifically held that community property is 'property of another' within the meaning of the malicious mischief statute, reversing the Court of Appeals and affirming the trial court's conviction.

Thus, since Recuenco admits that he damaged community property, we hold that the evidence was sufficient to show he damaged 'property of another.' Recuenco does not assert that the State failed to prove any of the other elements of the charge of malicious mischief in the third degree. Therefore, the conviction is affirmed.

2. Jury Instructions.

A. Lesser Included Offenses.

Recuenco asserts that the trial court erred in refusing to instruct the jury on the crime of aiming a firearm as a lesser included offense of second degree assault.[9] *State v. Workman* firmly establishes that a defendant in Washington is entitled to an instruction on a lesser included offense where (1) 'each of the elements of the lesser offense must be a necessary element of the offense charged' (legal prong), and (2) 'the

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[7] RCW 9A.48.090.

[8] *State v. Coria*, 146 Wn.2d 631, 48 P.3d 980 (2002).

[9] RCW 10.61.006 ('{T}he defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.').

evidence in the case must support an inference that the lesser crime was committed' to the exclusion of the charged offense (factual prong).[10] The trial court here rejected Recuenco's proposed jury instruction on the grounds that the language of the aiming a firearm statute expressly precluded its use as a lesser included offense of assault. Although this was an improper analysis of the legal prong of Workman, the judgment of the trial court will not be reversed if it can be sustained on any legal theory, even if different from that indicated by the trial judge.[11] Recuenco asserts that the elements of the crime of aiming a firearm are necessary elements of the charged crime of assault by a deadly weapon. However, a defendant need not aim a firearm at a person to assault him or her. The defendant could merely display a firearm, but not aim it, and be found guilty of assault where the circumstances show a reasonable person would be afraid for his or her own bodily safety.[12] Thus, the crime of aiming a firearm is not a necessary element of the crime of second degree assault.[13] The legal prong of Workman is not met.

To show that the factual prong is met, "some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an

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[10] *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Fernandez Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).

[11] *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) (citing *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985)).

[12] *State v. Karp*, 69 Wn.App. 369, 374-75, 848 P.2d 1304 (1993) (citing *State v. Murphy*, 7 Wn.App. 505, 511-12, 500 P.2d 1276 (1972)).

[13] *State v. Southerland*, 45 Wn.App. 885, 890, 728 P.2d 1079, rev'd on other grounds, 109 Wn.2d 389, 745 P.2d 33 (1987) (aiming a firearm is not a necessary element of second degree assault with a weapon); *State v. Bishop*, 6 Wn.App. 146, 152, 491 P.2d 1359 (1971) (to convict an accused of second degree assault, assaulting another with a weapon, does not necessarily require proof of aiming a firearm).

instruction will be given."[14] Further, although the evidence must be viewed in the light most favorable to the party requesting the instruction, the evidence must raise an inference that only the lesser included offense was committed to the exclusion of the charged offense.[15]

Recuenco argues that the factual prong of *Workman* is met because the jury could have found that he had no specific intent to cause reasonable apprehension of harm, but could have found that that he was guilty of aiming a firearm. However, neither the State nor Recuenco provided any evidence that he lacked the intent required of second degree assault; Recuenco simply denied pointing a gun at his wife. Thus, Recuenco's own theory of the case involved no aiming of a firearm. Because the evidence here did not affirmatively show that only a lesser crime was committed, we hold that the court did not err in refusing to give Recuenco's proposed lesser included offense instruction.

B. Lesser Degree Offense.

Recuenco argues that the trial court erred in refusing to instruct the jury on the crime of fourth degree assault as a lesser degree of second degree assault.[16] A defendant is entitled to a lesser degree offense instruction where (1) the statutes for both the charged offense and the proposed inferior

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[14] *State v. Berlin*, 133 Wn.2d 541, 546, 947 P.2d 700 (1997) (quoting *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)). *See also, State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (If the affirmative evidence presented 'would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given.').

[15] *Fernandez-Medina*, 141 Wn.2d at 455-56.

[16] RCW 10.61.003 (for an offense consisting of different degrees the jury may find the defendant not guilty of the degree charged and guilty of any degree inferior thereto).

degree offense 'proscribe but one offense;' (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.[17] The State concedes that the elements of fourth degree assault are necessarily included in the crime of second degree assault.[18] Thus, the only issue is whether there is affirmative evidence that the defendant committed only the inferior offense. The trial court properly found that there was not.

Recuenco asserts that the evidence of the struggle with his wife over control of the phone would support a conviction for fourth degree assault if the jury did not believe he was guilty of second degree assault. However, like a lesser included offense instruction, a lesser degree instruction is warranted where the evidence would permit a jury to find a defendant guilty only of the lesser offense, thereby acquitting him of the greater charge.[19] Recuenco cannot explain how a possible determination that he was guilty of fourth degree assault when he struggled to take the phone from his wife negates his guilt for second degree assault for the separate charged act of pointing a pistol at her. Thus, the evidence would not permit the jury to find Recuenco guilty of only the lesser offense. Because the offenses do not constitute lesser degrees of the same charged crime, we hold that the trial court did not err in refusing to give Recuenco's lesser degree offense instruction.

3. Aiming a Firearm as a Concurrent Offense to Second Degree Assault.

"{W}here a special statute punishes the same conduct which is punished under a general statute, the special statute

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[17] *State v. Tamalini*, 134 Wn.2d 725, 732, 953 P.2d 450 (1998).

[18] RCW 9A.36.041 defines fourth degree assault as an assault not amounting to first, second, or third degree assault.

[19] *Fernandez Medina*, 141 Wn.2d at 456; *Tamalini*, 134 Wn.2d at 732.

applies and the accused can be charged only under that statute."[20] Recuenco asserts that the crime of aiming a firearm is concurrent to the crime of second degree assault, as charged in this case, because it punishes the same conduct. He claims that because the State improperly charged him under a general statute when the more specific statute applied, he can only be convicted of the specific offense of aiming a firearm.

The determining factor in whether a special statute is concurrent with a general statute is that the general statute will be violated in each instance where the special statute is violated.[21] As discussed above, aiming a firearm does not produce an assault in each instance. An assault is an actual battery, an attempted battery, or an act done with the intent of creating apprehension or fear of imminent injury.[22] The crime of aiming a firearm involves only aiming a firearm at or towards any person.

Therefore, an individual can commit the crime of aiming a firearm even where circumstances indicate that no battery, attempted battery, or intent to create fear or apprehension occurred. Further, the crime of aiming a weapon punishes only the action of aiming the weapon, and specifically excludes actions that would comprise an assault.[23] Thus the statute defining the crime of aiming a firearm does not punish the same conduct described in the statute defining second degree assault. The two statutes are not concurrent. Thus, we hold that the State did not err in charging him with assault with a deadly weapon, rather than the crime of aiming a firearm, and

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[20] *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984) (quoting *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)).

[21] *Shriner*, 101 Wn.2d at 580. *See also*, 69 Wn.App. at 372.

[22] *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996).

[23] RCW 9.41.230(1)(a).

the jury did not err in convicting him of assault with a deadly weapon.

4. Firearm Enhancement.

The State's information charged Recuenco with being armed with a deadly weapon at the time of the assault, 'to-wit: a handgun, under the authority of {former} RCW 9.94A.125 and 9.94A.310.' Washington's Sentencing Reform Act of 1981 requires only that the jury find by special verdict that a deadly weapon was used, not whether the deadly weapon was a firearm.[24] The jury found that Recuenco was armed with a deadly weapon when he committed the assault. At sentencing, Recuenco argued the court could only impose a deadly weapon enhancement of one year, not a firearm enhancement, because the jury made no specific firearm finding.[25] The trial court found that the deadly weapon used was a firearm and imposed the mandatory three-year firearm enhancement.[26]

Recuenco argues that the United States Supreme Court recently held in *Ring v. Arizona* that some sentencing factors, like the firearm enhancement here, are actually elements of the crime and thus need to be pleaded and proven to the jury.[27] The State cites *Harris v. United States*, decided the same day as Ring, to support its argument that the firearm

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[24] Former 9.94A.125.

[25] Former RCW 9.94A.310(4)(b) provided that one year would be added to the sentence of a conviction for any class B felony where the offender was armed with a deadly weapon, except a firearm as defined in RCW. 9.41.010. Second degree assault is a class B felony. RCW 9A.36.021(2).

[26] Former RCW 9.94A.310(3)(b) provided that a firearm enhancement of three years would be added to the sentence of a conviction for any class B felony where the offender was armed with a firearm as defined in RCW 9.41.010.

[27] *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

finding constitutes a sentencing factor, not an element of the crime, and thus need not be found by the jury.[28] Although Recuenco did not object to the alleged error at trial, omitting an element of the crime charged from jury instructions constitutes a 'manifest' constitutional error and may be reviewed for the first time on appeal.[29]

Nevertheless, even if we assume for purposes of argument that under *Apprendi v. New Jersey*,[30] as interpreted by *Harris* and *Ring*, the firearm finding is an element of the crime charged and thus should have been included on the jury's special verdict form, we find that any possible error was harmless beyond a reasonable doubt.[31]

In order to hold the error harmless, the appellate court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error."[32] The only weapon mentioned or charged in connection with the assault here was a firearm. The information specified that the deadly weapon Recuenco used in the assault was a handgun, a firearm. The prosecution argued to the jury that Recuenco committed the assault with a firearm. Jury instructions specified that a firearm constituted a deadly weapon. The jury then specifically found that Recuenco had committed the assault using a deadly weapon. No other weapon was mentioned. Any constitutional error was harmless because it is clear

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[28] *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).

[29] *Eastmond*, 129 Wn.2d at 502; RAP 2.5(a); *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976); CrR 6.15(c).

[30] *Apprendi v. New Jersey*, 530 U.S. 466, 491, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *See also*, *McMillan v. Pennsylvania*, 477 U.S. 79, 81, 88, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

[31] *State v. Brown*, 147 Wn.2d 330, 339-41, 58 P.3d 889 (2002).

[32] *Brown*, 147 Wn.2d at 341 (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

beyond a reasonable doubt that the jury's verdict was not affected by the error.[33]

The decision of the trial court is affirmed.

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[33] It also appears that Recuenco invited the error because he proposed the special verdict form given by the court which specified that the jury only needed to make a deadly weapon finding, not a finding about the type of weapon used. Defense counsel stated during discussion of the instructions, '{T}he special verdict form is the same as what I have proposed, so there is no objection to that.' 8 Report of Proceedings at 802-03. Where defendants propose erroneous instructions that do not include all elements of a crime, but do not attempt to add a remedial instruction, they invite the error and cannot complain on appeal. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (citing *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999)).

APPENDIX C

SUPREME COURT OF WASHINGTON,

En Banc

Nos. 74147-6, 75053-0, 75063-7

STATE OF WASHINGTON,

Respondent,

v.

DANIEL D. HUGHES,

Petitioner.

STATE OF WASHINGTON,

Respondent,

v.

GEORGE LEONARD SELVIDGE,

Petitioner.

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RAY ANDERSON,

Petitioner.

Argued Nov. 9, 2004
Decided April 14, 2005

Sentences reversed and cases remanded, and conviction of third defendant affirmed.

Sanders, J., filed concurring opinion.

FAIRHURST, J.

[Excerpt]

C. *Can Harmless Error Analysis Apply to Blakely Violations?*

Not all federal constitutional errors require reversal, some may have been harmless in their effect on the trial. *Sullivan v. Louisiana*, 508 U.S. 275, 278-79, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Some constitutional errors, however, "will always invalidate the conviction" and are considered "structural" errors. *Id.* at 279, 113 S.Ct. 2078. Such violations that have been deemed *never* to be harmless include a deficient reasonable doubt instruction, deprivation of the right to counsel, a biased trial judge, and violation of the right to self-representation. *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

This court addressed the question of whether violation of the Sixth Amendment right to have a jury find facts that increase the penalty for a crime beyond the absolute statutory maximum can be deemed harmless error in *State v. Thomas*, 150 Wash.2d 821, 849-50, 83 P.3d 970 (2004). There, we analyzed several errors regarding jury instructions and held that violations of the Sixth Amendment right to have a jury find aggravating circumstances cannot be harmless. *Id.* Following the Supreme Court's decision in *Blakely*, we still hold that harmless error analysis is inappropriate but take this opportunity to clarify our reasoning.

The Supreme Court's reasoning in *Sullivan* articulates the absurdity of applying harmless error analysis to *Blakely* Sixth Amendment violations. *See Sullivan*, 508 U.S. 275, 113 S.Ct. 2078. There, the Supreme Court held that a constitutionally deficient reasonable doubt instruction could never be harm-

less, equating it to lack of a jury verdict of guilty beyond a reasonable doubt. *See Sullivan*, 508 U.S. at 279-80, 113 S.Ct. 2078. The Court reasoned that the traditional harmless error analysis defined by *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), requiring a showing beyond a reasonable doubt that the error at issue did not contribute to the verdict received, could not be applied where there was no verdict of guilty beyond a reasonable doubt:

> Consistent with the jury-trial guarantee, the question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand . . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, *because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.*
>
> Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found*

> petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

Sullivan, 508 U.S. at 279-80, 113 S.Ct. 2078 (some emphasis added) (citations omitted).

The Court reasoned that because there was not a proper reasonable doubt instruction, there had not been a jury verdict of guilty beyond a reasonable doubt. Thus, there was nothing upon which to apply the harmless error analysis to conclude that, but for the error, the result would have been the same. To the contrary, the court would only have been speculating on how the jury *would have found* if they had been correctly instructed.

This is directly analogous to the situation presented by judges, rather than juries, finding facts necessary to increase sentences. In each case at hand, there was no jury finding beyond a reasonable doubt of aggravating factors warranting an enhanced sentence. It would be illogical to perform harmless error analysis on the absence of those findings. There is no object upon which to apply harmless error analysis. Instead of asking whether but for the error the findings *would have been the same*, the court would be asking whether but for the error the findings *would have been different*. Such an analysis is the equivalent of speculating on the jury's verdict, which the Supreme Court has held is never allowed.[1]

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[1] The Washington Court of Appeals applied the Court's reasoning in *Sullivan* in a similar way in *State v. Jackson*, 87 Wash.App. 801, 944 P.2d 403 (1997), *aff'd*, 137 Wash.2d 712, 976 P.2d 1229 (1999). The court there analyzed whether a jury instruction without the proper standard for

Supporters of harmless error analysis, argue that the Supreme Court and other federal courts have already held that harmless error analysis applies to *Apprendi/Blakely* Sixth Amendment violations. Those proponents, however, incorrectly characterize *United States v. Cotton*, 535 U.S. 625, 631, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Instead of holding that harmless error analysis applied to *Apprendi* violations, the Supreme Court in *Cotton* actually applied the plain error doctrine.[2] It held that plain error analysis could be applied to *Apprendi* violations and concluded that the error at issue did not affect the "fairness, integrity, or public reputation" of the proceedings. *Id.* at 631-32., 122 S.Ct. 1781.

The Ninth Circuit subsequently addressed whether harmless error could be applied to *Apprendi* violations and held that the Supreme Court's analysis in *Cotton* regarding plain

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finding guilt as an accomplice could be deemed harmless. *Id.* at 814-16, 944 P.2d 403. The court reasoned that in applying harmless error analysis, the reviewing court asks whether the guilty verdict was "unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical jury faced with the same record, except for the error." *Id.* at 813, 944 P.2d 403 (citing *Smith*, 131 Wash.2d at 266, 930 P.2d 917). It went on to discuss *Sullivan* and concluded that "[h]armless error analysis is incompatible with the absence of an actual verdict beyond a reasonable doubt." *Id.* at 814, 944 P.2d 403 (citing *Carella v. California*, 491 U.S. 263, 269, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (Scalia, J., concurring)). Thus, "[l]acking a formal verdict, the appellate court would be infringing the right to a jury trial by holding that no reasonable jury would have found otherwise." *Id.* (citing *California v. Roy*, 519 U.S. 2, 117 S.Ct. 337, 339, 136 L.Ed.2d 266 (1996) (Scalia, J., concurring)).

[2] Plain error analysis considers the situation where a party raises an issue for the first time on appeal and requires that party to show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Cotton*, 535 U.S. at 631, 122 S.Ct. 1781 (quoting *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)). Following that showing, the party must also prove that "'(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *Johnson*, 520 U.S. at 467, 117 S.Ct. 1544).

error did not control its decision: "*United States v. Cotton* . . . does not control nor aid our analysis. The lack of drug quantity in the indictment and jury decision in that case was analyzed under plain error, not harmless error." *United States v. Jordan*, 291 F.3d 1091, 1096 n. 7 (9th Cir.2002).

The Ninth Circuit went on to find that harmless error is *not* appropriate where the exceptional sentence is *greater* than that allowed for the offense charged and found by the jury. *Id.* at 1096-97. Like the Supreme Court in *Sullivan*, the Ninth Circuit found that harmless error analysis in such a situation would require too much speculation "[w]hen quantity [the basis for the exceptional sentence] is neither alleged in the indictment nor proved to a jury beyond a reasonable doubt, there are too many unknowns to be able to say with any confidence, let alone beyond reasonable doubt, that the error was harmless." *Id.* at 1096. Additionally, the court was troubled that consideration of the defense's likely response to the aggravating evidence was also speculative. *See id.* at 1096-97. The court concluded that *whenever* a fact that increases the maximum sentence is not decided by the jury, "the error must be corrected." *Id.* at 1097.

Harmless error proponents also assert that other persuasive authorities have applied such analysis to *Apprendi/Blakely* violations.[3] Indeed, *some* federal jurisdictions have applied harmless error analysis. *See, e.g., Campbell v. United States*, 364 F.3d 727, 737 (6th Cir.2004) (reasoning that *Apprendi*

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[3] Respondent Lewis County Prosecutor cites two Ninth Circuit cases as applying harmless error analysis to *Apprendi* violations. *See* Resp't Br. at 12 n.41. Respondent misrepresents those cases; they actually apply plain error analysis, which is distinct. They do not address the applicability of harmless error. *See, e.g., United States v. Valensia*, 299 F.3d 1068, 1076-77 (9th Cir.2002). Respondent also discusses several Washington cases with similar facts to support application of harmless error analysis here. Resp't Br. at 12-13. Those cases, however, were decided *before Blakely* and the evolution of the constitutional right at issue here.

errors are "trial-type" errors subject to harmless error analysis and holding that the reviewing court must determine beyond a reasonable doubt whether the jury would have found the fact at issue in sentencing). The Fifth Circuit also applied harmless error analysis and provided more reasoning for doing so. *See United States v. Matthews*, 312 F.3d 652 (5th Cir.2002). There, the Fifth Circuit reasoned that an *Apprendi* violation really contains a defective indictment and a defective jury instruction, neither of which are in the limited class of structural constitutional errors that can never be deemed harmless. *Id.* at 665. It also noted that the Supreme Court applied harmless error analysis to the omission of offense elements from a jury instruction. But it did not discuss the implicit difference between asking whether but for the error, the jury would have rendered the *same* or *different* verdict.

The authority asserted by harmless error proponents is unpersuasive. The federal jurisdictions appear inconsistent in whether they will apply harmless error analysis to *Apprendi*/*Blakely* violations. Moreover, the Supreme Court has not yet ruled to clarify this issue.[4]

The proponents of harmless error analysis also seek to analogize *Blakely* Sixth Amendment violations to omission of offense elements from jury instructions, which the Supreme Court has held is subject to harmless error analysis.[5] *See*

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[4] In *Booker*, the Supreme Court's most recent opinion regarding the constitutionality of sentencing schemes with judicial fact-finding, the Court did not rule on the applicability of harmless error analysis. However, if anything, the majority opinion written by Justice Breyer implied that harmless error analysis would not be applicable to such Sixth Amendment violations: "[I]n cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine." *Booker*, 125 S.Ct. at 769.

[5] This court adopted the United States Supreme Court holding in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), in *State v. Brown*, 147 Wash.2d 330, 340, 58 P.3d 889 (2002). We further

Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The Court there held that conclusion was consistent with *Sullivan*, distinguishing the situation where *all* of the jury's findings were "vitiated" by the improper reasonable doubt instruction from that where the jury simply did not explicitly find on *one* element. *Id.* at 10-15, 119 S.Ct. 1827.

The situation arising in *Blakely* Sixth Amendment violations is readily distinguishable from the scenario in *Neder*. Although *Neder* involved the situation where a jury did not find facts supporting every element of the crime, it still returned a guilty verdict. Like traditional harmless error analysis cases, the reviewing court could ask whether but for the omission in the jury instruction, the jury would have returned the *same* verdict. Where *Blakely* violations are at issue, however, the jury necessarily did *not* return a special verdict or explicit findings on the aggravating factors supporting the exceptional sentence. The reviewing court asks whether but for the error, the jury would have made *different* or *new* findings. This situation is analogous to *Sullivan*—there is no basis upon which to conduct a harmless error analysis. Instead, proponents of harmless error ask this court to speculate on what juries would have done if they had been asked to find different facts. This speculation is not permitted. Harmless error analysis cannot be conducted on *Blakely* Sixth Amendment violations.

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explained in *Thomas* that not every omission or misstatement of an element in a jury instruction relieves the State of its burden: "'the error is harmless if that element is supported by uncontroverted evidence.'" *Thomas*, 150 Wash.2d at 844-45, 83 P.3d 970 (quoting *Brown*, 147 Wash.2d at 341, 58 P.3d 889). And in that very same opinion, we held that harmless error analysis *could not* apply to *Apprendi* violations. *Id.* at 847, 849. That case presented *both* types of errors and we chose *not* to apply the *Neder* reasoning to *Apprendi* errors.